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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

JOAN A. HAGANS,

Petitioner,

v.

CECIL ANDRUS,
Secretary of the Department of the Interior,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Ninth Circuit was contrary to the decisions of this Court regarding the burden of proof in cases filed pursuant to the Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C. § 2000(e) *et seq.*

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OPINION BELOW

The opinion of the Court of Appeals (App. A, *infra*) is reported at ___ F.2d ___. The opinion of the district court is unreported. (App. C *infra*)

JURISDICTION

The judgment of the Court of Appeals (Appendix "A", *infra*) was entered on February 5, 1981. A timely petition for rehearing was filed with the Court on February

19, 1981. That petition was denied by the Court on April 9, 1981 (Appendix "C"). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 701 of the Civil Rights Act of 1964, 42 U.S.C. §2000 (E-16c) reads as follows:

> Civil action by employee or applicant for employment for redress of grievance; time for bringing of action; head of department, agency, or unit as defendant.
>
> (c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in sections 2000(e)-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

STATEMENT OF CASE

1. Joan A. Hagans is a female employee of the United States Department of the Interior, in Anchorage, Alaska, who was denied a promotion to Assistant Manager of the Alaska office, Outer Continental Shelf, in 1977. Hagans was found qualified for the position but was denied the appointment and a male employee of the Department of the Interior was selected at the same time Hagans was rejected. Hagans' supervisor, Edward Hoffman, set many of the criteria for the position, interviewed all of the candidates and made the final and ultimate recommendation as to which of the candidates would be chosen for the vacancy. It was Hagans' belief that the criteria selected by Hoffman were totally subjective and that in the selection process and in his treatment of Hagans, Hoffman demonstrated a hostile attitude toward placing a woman in a supervisory position in the Alaska office, Outer Continental Shelf.

2. Hagans filed a complaint with the United States District Court for the District of Alaska pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-16(c,) one hundred and eighty days after the United States Department of the Interior failed to act on her administrative complaint. Trial of this case commenced before the Honorable James A. von der Heydt, United States District Judge for the District of Alaska on April 9, 1979. At the conclusion of Hagans' case, the government moved for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b). On April 20, 1979, in open court, the trial court ruled that Hagans' complaint would be dismissed for failure to establish a *prima facie* case. The United States District Court applied the four-point test set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973),

requiring Hagans to carry the burden of proving that she belonged to a minority group, that she applied for a job for which her employer was seeking applicants, that despite her qualifications she was rejected and that after rejection the position remained open and the employer continued to seek applicants. Additionally, the United States District Court held that there was no evidence to link Hagans' rejection "in a way that plainly suggests sexual discrimination". The decision of the district court was not reported, but is set out in Appendix "B".

4. After entry of judgment, Hagans appealed the district court's decision to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1291. In a decision dated February 5, 1981, the court of appeals reversed those findings of the district court dismissing Hagans' action, and remanded the case. The court of appeals found that the district court failed to adapt the *McDonnell Douglas* criteria to the facts in this case. On remand the court of appeals adopted its own criteria for proving a *prima facie* case in promotion cases and directed the district judge to review the evidence and to determine whether that evidence was sufficient to create an inference that sex was "the likely reason for the denial of Hagans' job opportunity". Additionally, the court of appeals found that the district court's finding that the entire selection process was carried out in a superior manner with no hint of discrimination based on sex was clearly erroneous.

REASONS FOR GRANTING THE PETITION

In Hagans' view the court of appeals has misconstrued plaintiff's burden of proof under this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 668, 36 L.Ed.2d 1817 (1973). More importantly,

the decision of the court of appeals conflicts with the *McDonnell Douglas* decision and decisions of other circuit courts that have reviewed the issue of plaintiff's burden of proof in promotion cases. Although Hagans was successful in reversing the decision of the United States District Court for the District of Alaska, the opinion of the court of appeals places an undue hardship and burden on Hagans in presenting her *prima facie* case at trial. In order to avoid further appeals in this case, Hagans respectfully submits that this Court should invoke its powers of discretionary review and provide guidelines to the Ninth Circuit and to the United States District Court for the District of Alaska consistent with the *McDonnell Douglas* decision.

1. The decision of the court of appeals is contrary to this Court's guidelines in *McDonnell Douglas Corp. v. Green, supra.* In *Hagans v. Andrus,* the court of appeals remanded to the district court for a determination of whether or not the evidence was sufficient to create an inference that sex was "the likely reason for the denial of the job opportunity" to Hagans. Although the court of appeals recognized that the *McDonnell Douglas* guidelines should be adapted to fit the factual circumstances of each case, the court's holding requires too arduous a threshold burden for plaintiff in proving her *prima facie* case. It is Hagans' position that all *McDonnell Douglas* requires of an individual bringing suit under Title VII is to demonstrate that the alleged discrimination did not result from a lack of qualifications or the absence of a vacancy in the job sought. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 358 n.44, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); *Aikens v. United States Postal Service,* 642 F.2d 514, 517 (D.C. Cir. 1980). Under the burden of proof adopted by the court

of appeals, Hagans must do more. Rather than present sufficient evidence which gives rise to an inference of unlawful discrimination, Hagans must initially prove that she was denied her promotion because of sex.

Subsequent to the Hagans decision, this Court further defined the nature of the evidentiary burden placed on the parties in an employment discrimination suit brought under Title VII. In *Texas Department of Community Affairs v. Burdine*, ___ U.S. ___ , ___ S.Ct. ___ , 67 L.Ed.2d 207 (1981) this Court reviewed the burden placed on the defendant once plaintiff proved her *prima facie* case. In doing so, however, the Court discussed plaintiff's burden requiring that she prove by a preponderance of the evidence that she applied for an available position for which she was qualified and for which she was rejected under the circumstances which gives rise to an inference of unlawful discrimination. *Id.* 67 L.Ed.2d at 215. After discussing the defendant's burden of proof in *Burdine*, this Court held that once the defendant met its burden, plaintiff must be given the opportunity to demonstrate that need that employer's reason was a pretext. This burden, the Court held, merged with the ultimate burden of persuading the Court that plaintiff had been the victim of intentional discrimination. Thus, Hagans submits that the burden of proof adopted by the court of appeals in this case, i.e., that sex was the likely reason for the denial of the job opportunity, is the ultimate burden of proof which only arises once plaintiff has established her *prima facie* case, the employer has met its burden in articulating a legitimate non-discriminatory reason for failing to employ or promote the plaintiff and plaintiff has met its final burden of proving that the employer's reasons were mere pretext. The effect of the court of appeals' decision is to require Hagans to prove her case initially in order to satisfy the *prima facie* case

requirement. Thus, the decision is contrary to *McDonnell Douglas* and its progeny.

2. The decision of the Ninth Circuit is in conflict with decisions of other circuits in an area of the law that Hagans believes should be applied uniformly throughout the United States. In *Aikens v. United States Postal Service*, 643 F.2d 514 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia Circuit rejected the argument that plaintiff should be required to prove discriminatory motive on the part of the employer as plaintiff's initial burden of proof. Although *Aikens* involved a black man who alleged that he was not promoted because of his race, the same standard should apply in sex discrimination cases. In *Aikens*, the D.C. Circuit held that plaintiff met his burden of proof under *McDonnell Douglas* once he established that he was a black man, had sought a promotion to a higher level position which became available and that a white post office employee received the position for which he was qualified. *Id.* at 517. That evidence was sufficient to raise an inference of discriminatory intent.

The decision of the court of appeals in *Hagans v. Andrus* either departs from the rationale adopted by this court and other circuits (*see also, Pettit v. United States*, 488 F.2d 1026 (Ct. Cl. 1973), or distinguishes (perhaps inadvertently) between cases involving sexual discrimination and racial discrimination. In either case the decision of the court of appeals is erroneous.

3. Because the issues involved in the Hagans case are substantial and because the United States Court of Appeals for the Ninth Circuit appears at odds with controlling decisions of this Court and decisions of other circuits, Hagans believes she is entitled to seek discretionary review from this Court. Hagans respectfully requests that

the decision of the circuit court be sustained in its reversal of the United States District Court for the District of Alaska but that the adoption by the court of appeals of a burden of proof which requires Hagans to prove that sex was the likely reason for the denial of her promotion be reversed.

CONCLUSION

For these reasons, Hagans respectfully submits that her petition for a writ of certiorari should be granted.

Respectfully submitted this 8th day of July, 1981.

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APPENDIX A

Joan A. HAGANS, Plaintiff-Appellant,

v.

Cecil ANDRUS, Secretary of the Department of the Interior, Defendant-Appellee.

No. 79-4424.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Sept. 9, 1980.

Decided Feb. 5, 1981.

The United States District Court for the District of Alaska, James A. von der Heydt, Chief Judge, entered judgment involuntarily dismissing sex discrimination action against Secretary of Department of Interior, and appeal was taken. The Court of Appeals, Wallace, Circuit Judge, held that: (1) hiring of male applicant, from several qualified applicants, for Department position did not preclude sex discrimination plaintiff from establishing prima facie case under disparate treatment theory, but she was required to establish inference that sex was likely reason for denial of job opportunity; simple fact that male applicant was hired was not sufficient to establish prima facie case, and (2) neither trial judge's comments that "[plaintiff] went a long ways as a woman before [applying for position to which she was not promoted]," nor fact that trial judge entered involuntary dismissal or committed error of law, required that trial judge recuse himself.

Affirmed in part, and reversed and remanded in part.

Appeal from the United States District Court for the District of Alaska.

Before WALLACE, HUG and SCHROEDER, Circuit Judges.

WALLACE, Circuit Judge:

Joan Hagans brought suit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Her complaint alleged that the Secretary of the Interior, by his agents and employees (the government), unlawfully discriminated against her on the basis of sex by hiring a male for a position for which she alleges to have been more qualified. At the conclusion of Hagans' case, the district court granted the government's motion for an involuntary dismissal, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The court held that Hagans had failed to establish a prima facie case of discrimination. Hagans appeals from the judgment for the government and from the district judge's failure to grant her motion that he recuse himself. We affirm in part, and reverse and remand in part.

I

Hagans began her government service in 1955 when she had a GS-4 position with the Bureau of Land Management (BLM). In 1957, she received her first supervisory position. By 1970, she had moved up to a GS-12 position as a chief adjudicator, with a staff of 35 to 40 persons. In 1974, she became Chief of Operations of the Alaska Outer Continental Shelf (OCS) Office, a GS-13 position. Throughout her government service, Hagans received several awards for superior performance and special achievement.

Edward Hoffmann, the manager of the Alaska OCS Office, selected Hagans for the OCS job. Hoffmann was the immediate supervisor of Hagans and Donald Henninger, the chief of the Environmental Assessment Division. Hagans and Henninger alternated as acting manager whenever Hoffmann was absent. Several conflicts arose between Hagans and Henninger. Some of the conflicts arose out of disputes over the proper division of responsibility between their two offices. Some of the conflicts, however, occurred because of Henninger's apparent hostility towards women in the work place and, more specifically, his hostility towards women in supervisory positions. Hoffmann recognized that Henninger's attitude was a problem. Hoffmann counseled Henninger about it, and at one point tried to have Henninger transferred. Hoffmann, however, never took any formal action to reprimand Henninger, and the conflict was never resolved. Although Hoffmann and Hagans enjoyed a good, close working relationship throughout this period, Hoffmann testified that he thought that having a woman supervisor would cause Henninger a great deal of stress.

In 1977, a new GS-14 level position of assistant manager was created for the OCS Office. Hagans applied for the position. A promotion panel in Washington, D.C. did an initial screening that apparently weeded out candidates that lacked the basic qualifications for the job. Hoffmann was then to select the top three candidates from the 11 candidates submitted to him, and the final choice would be made in Washington. Hoffmann made Robert Brock, a staff assistant to the Assistant Secretary of the Interior for the OCS program nationwide, his first choice; Hagans was his second choice. The Washington office selected Brock

for the job. Hoffmann gave several reasons for making Brock his first choice. He emphasized that Brock's "Washington perspective" gave him an advantage over Hagans who, in Hoffmann's view, had a narrow, provincial outlook. Other reasons included Brock's ability to analyze environmental impact statements; the need for fresh outlooks and outside experience; Hoffmann's plans to retire and his desire to select an "heir apparent"; and the inter-divisional conflicts between Hagans and Henninger.

II

We begin by analyzing the district court's conclusions of law. These are freely reviewable on appeal. *Miller v. United States*, 587 F.2d 991, 994 (9th Cir. 1978).

All Title VII "disparate treatment"[1] cases are divided into three parts. First, the plaintiff has the burden to establish a prima facie case of discrimination. Second, if the plaintiff is successful, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employee's rejection. Third, if the defendant successfully carries that burden, the plaintiff has the opportunity to demonstrate that the reasons stated by the defendant were a mere pretext. *McDon-*

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[1]Title VII discrimination can appear in at least two forms. In "disparate treatment" cases, an "employer simply treats people less favorably than others because of their race, color, religion, sex, or national origin." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). "Disparate impact" cases "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* In the instant case, Hagans has alleged disparate treatment, not disparate impact.

nell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-1825, 36 L.Ed.2d 668 (1973) (*McDonnell Douglas*).

In granting the government's motion for dismissal, the court held that Hagans had failed to establish a prima facie case under *McDonnell Douglas*. Because we conclude that the court applied an improper legal standard, we reverse and remand for further proceedings. The district judge must then initially decide whether Hagans did establish a prima facie case under the correct legal standard.

The district court applied the four point test set forth in *McDonnell Douglas* that the plaintiff must meet to establish a prima facie disparate treatment case. By applying that test strictly, the district judge required Hagans to carry the burden of proving

> (i) that [she] belongs to a [minority group]; (ii) that [she] applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite [her] qualifications, [she] was rejected; and (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. 411 U.S. at 802, 93 S.Ct. at 1824. The district court reasoned that because the position was filled by Brock, it did not remain open and thus Hagans had failed to satisfy the fourth prong of *McDonnell Douglas*.

The *McDonnell Douglas* test is not, however, so rigid. The Supreme Court observed, after stating the four point test, that the prima facie proof required would necessarily depend on the facts, and that the test stated would "not necessarily [apply] in every respect to

differing factual situations." *Id.* at 802 n. 13, 93 S.Ct. at 1824 n.13. The Court has reiterated the flexibility of the *McDonnell Douglas* test in subsequent decisions. *See Furnico Constr. Corp. v. Waters*, 438 U.S. 567, 575-76, 98 S.Ct. 2943, 2948-2949, 57 L.Ed.2d 957 (1978); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). *See also White v. City of San Diego*, 605 F.2d 455, 458 (9th Cir. 1979).

The district court improperly failed to adapt the *McDonnell Douglas* test to the facts of this case. In *McDonnell Douglas* it was significant that the position sought by the plaintiff remained open after his rejection, and that the employer continued to seek applicants with the plaintiff's qualifications. In the instant case, several qualified people applied for one job that would necessarily be filled by one of them at a predetermined time. Hagans' rejection necessarily occurred simultaneously with Brock's hiring. Thus, the position could not possibly "remain open." To apply rigidly the *McDonnell Douglas* test to this situation would deny any plaintiff the opportunity to establish a prima facie case, no matter how blatant the discrimination.

It appears that Hagans satisfied the first three prongs of *McDonnell Douglas*. She was a member of a "minority,"[2] was qualified for the job,[3] and was

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[2] *McDonnell Douglas* involved only racial minorities. We have, however, applied *McDonnell Douglas* to sex discrimination cases. *See White v. City of San Diego*, 605 F.2d 455 (9th Cir. 1979).

[3] The government concedes that Hagans was qualified for the job. This is all that is necessary to satisfy the qualification prong of *McDonnell Douglas*. It is not necessary for Hagans to show

[footnote continued]

rejected for the position. The question before us is what more a plaintiff must show in a case such as this to establish a prima facie case.

In *White v. City of San Diego, supra*, we recognized the need for a flexible approach to the *McDonnell Douglas* standard. We stated that "a proper prima facie case identifies sex as the likely reason for the denial of a job opportunity." 605 F.2d at 458. This statement in *White* accurately identifies the import of *McDonnell Douglas* and its progeny. The Supreme Court itself, noting that the test stated in *McDonnell Douglas* does not apply to every case, has interpreted *McDonnell Douglas* to require a Title VII plaintiff to offer sufficient evidence "to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *International Bhd. of Teamsters v. United States, supra*, 431 U.S. at 358, 97 S.Ct. at 1866. The Court has also stated that "[p]roof of discriminatory motive is critical. . . ." *Id.* at 335 n.15, 97 S.Ct. at 1854, n.15. *See also Furnco Constr. Corp. v. Waters, supra*, 438 U.S. at 575-77, 98 S.Ct. at 2948-2950; *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761-62 (9th Cir. 1980).

We do not think it necessary to adopt a new, specific fourth prong of the *McDonnell Douglas* test to fit this case. We recognize that the Court of Claims has adopted a modified *McDonnell Douglas* test for use in failure to promote cases. *Pettit v. United States*, 488

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that she was *more* qualified than Brock. If, however, a plaintiff could show that she was more qualified than the person hired, this would be relevant evidence in an appropriate case in establishing the fourth prong of *McDonnell Douglas*.

F.2d 1026, 1033, 203 Ct.Cl. 207 (1973).[4] We have seen in the case before us that defining a test narrowly to adapt to one set of facts creates the risk that other courts will attempt to fit a different set of facts into a test that may be inappropriate. Therefore, we think it unwise to adopt the *Pettit* test as the only possible test in promotion cases; we do not, however, hold that the *Pettit* factors canot be considered. We do reject the test stated in *Jones v. Cleland*, 466 F.Supp. 34, 36-37 (N.D. Ala. 1978), which Hagans would have us adopt. In *Jones*, a sex discrimination in employment case, the court's fourth *McDonnell Douglas* prong was simply that a male was hired instead of a female. *Id.* Something more should be required to establish a prima facie case. *See International Bhd. of Teamsters v. United States, supra*, 431 U.S. at 358 n.44, 97 S.Ct. at 1866 n.44.

On remand, then, the district judge must review the evidence as it stands or, in his discretion, he may receive additional evidence. He then must determine whether the evidence is sufficient to create an inference that sex was "the likely reason for the denial of [the]

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[4] The Court of Claims held that

> a prima facie case of failure to promote because of racial discrimination is made by showing: (i) that plaintiff belongs to a racial minority, (ii) that he was qualified for promotion and might have reasonably expected selection for promotion under the defendant's on-going competitive promotion system, (iii) that he was not promoted, and (iv) the supervisory level employees having responsibility to exercise judgment under the promotion system betrayed in other matters a predisposition towards discrimination against members of the involved minority.

Pettit v. United States, 488 F.2d 1026, 1033, 203 Ct.Cl. 207 (1973).

job opportunity." *White v. City of San Diego, supra,* 605 F.2d at 458. If the evidence is sufficient to create such an inference, the district judge must then permit the government to go forward with its case. If the evidence is not sufficient to create such an inference, the district judge must dismiss the case.

In addition to its *McDonnell Douglas* holding, the district court held that there was no evidence to link Hagans' rejection "in a way that plainly suggests sexual discrimination," *citing Miller v. Williams,* 590 F.2d 317 (9th Cir. 1979). In *Miller,* the plaintiff claimed that she was fired from her job because of her activities in promoting the legitimate interests of women. *Id.* at 318. She argued that in a firing case, the court should apply only parts (i) and (iv) of *McDonnell Douglas.* We stated that parts (ii) and (iii) linked part (i) to part (iv) "in a way that plainly suggests discrimination." *Id.* at 320. Because plaintiff offered no alternative link, she failed to establish a prima facie case. *Id.* The "plainly suggests" language in *Miller* was merely descriptive of how the *McDonnell Douglas* elements interrelate; it did not describe the burden of proof on the plaintiff, as the district court's holding implies. The district court's statement that the evidence must "plainly suggest" sexual discrimination states too stringent a test for a prima facie case and thus was error. As we have said, the proper test is whether the evidence is sufficient to create an inference that sex was the likely reason for the denial of the job opportunity.

III

On remand, the district judge will apply the test we have stated to the facts of this case. Because Hagans has raised substantial questions concerning the district

judge's findings of fact, we conclude that it is appropriate for us to examine those disputed findings. Hagans attacks generally the district court's adoption of the findings of fact submitted by the government, and challenges specifically several of the findings.

Although we have been critical of the wholesale adoption by a district court of the prevailing party's submitted findings (except in highly technical or scientific cases), this practice does not by itself constitute reversible error. *Photo Electronics Corp. v. England,* 581 F.2d 772, 776-77 & n.4 (9th Cir. 1978). We must, however, engage in a more careful analysis of adopted findings than we would have had they been authored by the district judge. Nonetheless, the standard of review for all findings of fact is the clearly erroneous standard. *Id.* at 777; Fed.R.Civ.P. 52(a).

Hagans first challenges the finding that "[t]he entire selection process ... was carried out in a superior manner with absolutely no hint of discrimination based upon sex." This finding is clearly erroneous. There was some evidence that might tend to support Hagans' theory of sex discrimination. For example, Hoffmann's testimony regarding his failure to reprimand Henninger formally for Henninger's negative attitude toward women in the work place, and Hoffmann's belief that Henninger would feel uncomfortable working with a woman supervisor tend to show that sex might have been an impermissible factor in the decision. We express no opinion at this stage as to whether the evidence is sufficient to establish a prima facie case. We do conclude, however, that it is clearly erroneous to find "absolutely no hint" of sexual discrimination.

Hagans next challenges the court's findings concerning the possible alteration of notes by Hoffmann. At his

deposition, Hoffmann produced some notes, which he claimed were the original notes concerning his reasons for recommending Brock for the position. The notes were dated "12/12/77." Hoffmann testified that the notes had not been altered. During the trial, Hagans produced a copy of undated notes that were similar to the notes that Hoffmann had described but different in certain respects.[5] Hagans testified that she had taken notes without permission from Hoffmann's desk in April or May of 1978, made copies, and returned them. Hoffmann was not confronted with the copy of the second set of notes at his deposition, though Hagans had made the copy some months before, and he did not testify at trial. The district court found that "not one scintilla of evidence has been introduced to contradict" Hoffmann's statement in his deposition that he never altered the notes. Again, to say no evidence exists overstates the point. A reasonable person might

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[5]The notes that Hoffmann produced, dated 12/12/77, read as follows:

1. Ability to coordinate staff and division functions effectively and with high degree of skill
2. Ability to represent the programs of the office, Bureau and Department in many situations.
3. A need for broad-nationwide appreciation of the marine minerals program
4. An infusion of new experience and background into the management structure
5. A dedication to the program
6. A need for a strong and forceful alter-ego

The notes that Hagans produced during trial were undated, did not contain the phrase "into the management structure" in paragraph 4, and contained a paragraph 7, which read, "I also look at the distinct possibility of my retirement within the next couple of years and the need for effective continuity in the program."

infer from the two sets of notes that the dated copy had been altered. If so, this would bear on Hoffmann's credibility and on his true motives for recommending Brock.[6] Of course, the evaluation and weighing of evidence is within the discretion of the district judge. On remand, he should consider the two sets of notes and Hoffmann's testimony along with all the other relevant evidence in making his determinations. We hold only that to the extent this finding may be considered significant to the ultimate resolution of this case, it was clear error for the district court to find that there was "not one scintilla of evidence" that the notes had been altered.

Finally, Hagans challenges the court's finding and conclusion with regard to statistical evidence. Hagans offered evidence that as of October 31, 1975, only 2.8% of all GS-14 level employees in the Department of Interior were women. The district court disregarded these statistics because the OCS program had one of its four GS-14 positions (25%) filled by a woman.

The district court should have disregarded both statistics. The OCS 25% figure cannot be considered because the size of the sample (four) is much too small to be meaningful. *See Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 621, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974). The 2.8% Department of Interior figure is meaningless without evidence

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[6]Hagans offered evidence of a conversation between Hoffmann and Richard E. Redmond, the Chief of the Office of Equal Employment Opportunity at BLM. In that conversation, according to Redmond, Hoffmann said that he was looking for an "heir apparent." Redmond claims to have told Hoffmann that he thought the reference to an "heir apparent" meant that Hoffmann was looking for a replacement who was very much like himself, that is, a white male.

that there existed somewhere a pool of women applicants qualified to assume those GS-14 positions. *Pack v. Energy Research & Dev. Admin.*, 566 F.2d 1111, 113 (9th Cir. 1977).

IV

Hagans also appeals from the district judge's order denying her motion that he recuse himself. Hagans made the motion for disqualification, pursuant to 28 U.S.C. §455, after the judge granted the government's motion for a Rule 41(b) involuntary dismissal, but before judgment was entered.

A judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a).[7] Hagans questions the judge's impartiality on a number of grounds. First, she points to a comment that the judge made during the course of the trial. In discussing with counsel whether Hagans had encountered any sexual discrimination before she applied for the assistant manager's job, the judge said, "she went a long ways as a woman before that." This comment is insufficient to require recusal. The discussion of whether Hagans claimed any sexual discrimination prior to her application for the new job was relevant to the case. In that context[8] the comment

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[7]Section 455(b) lists five specific, additional grounds for disqualification. None of Hagans' allegations fits within any of the section 445(b) grounds.

[8]The exchange between counsel and the court was as follows:

THE COURT: Counsel, if there is anything in your evidence, it has shown this plaintiff didn't encounter any problems at all until she applied for the one job for which she was not appointed. Your allegation is that she was not appointed to the job only because she was a woman.

[footnote continued]

did not create a reasonable ground for questioning the judge's impartiality. *See United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980).

Hagans also claims that the judge's bias is the only explanation for his granting the government's Rule 41(b) motion, and for his refusal to accord "any weight" to her evidence. This claim is without merit. It is not a ground for disqualification that the judge has ruled against the moving party or that he may have committed an error of law. *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980).

Finally, Hagans claims that the district judge was seeking a position on this court and was therefore influenced by "judicial politics." This claim is frivolous.

We therefore affirm the denial of the motion for recusal.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

MR. HAGANS [counsel for the plaintiff]: That is right, and our allegation is this—

THE COURT: She went a long ways as a woman before that.

MR. HAGANS: In 23 years, I wouldn't call that very far.

THE COURT: Well, I suppose that can be argued one way or the other.

APPENDIX B

[FILED MAY 8, 1979]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JOAN A. HAGANS, Plaintiff,

v.

CECIL ANDRUS, Secretary of the
Department of the Interior, Defendant.

No. A78-182 Civil

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff has been employed by the Bureau of Land Management (BLM), United States Department of Labor, since May 5, 1955, and has progressed from a GS-4 to a GS-13 in that time period.

2. Plaintiff is a high school graduate and has completed only a few college courses.

3. Plaintiff in 1970 was promoted to Chief, Adjudicator of Lands and Minerals, in the State Office, BLM, at a grade of GS-12.

4. Plaintiff became aware in 1972 that the Alaska Outer Continental Shelf Office (AOCS) would be established.

5. In 1974 Plaintiff applied for and in October, 1974 was appointed as Chief, Division of Operations and Administration in AOCS at grade GS-13.

6. Robert Brock, the same person that was selected for the Assistant Manager position AOCS, also applied

for the position as Chief, Division of Operations and Administration in 1974 but Edward Hoffmann, Manager of AOCS selected Plaintiff.

7. During Plaintiff's incumbancy as Chief, Division of Operations and Administration, Edward Hoffmann relied very heavily upon plaintiff, sought her advice on all aspects of the operation of the office, and used her as a sounding board for various ideas.

8. From the inception of her federal career to the time of the selection of the Assistant Manager's position AOCS plaintiff never felt as if she has been discriminated against because of her sex and her promotions through her career have so indicated.

9. In the Spring of 1977 the AOCS Equal Employment Opportunity Officers commended Edward Hoffmann for his support and management of the EEO program in his office.

10. In December, 1976, plaintiff and Connie Wassink, another woman profession on Edward Hoffmann's staff, assembled the necessary materials and recommended that Hoffmann be awarded the Department of Interior Meritorious Service Award.

11. On October 11, 1977, BLM issued Vacancy Announcement #77-142, announcing the vacancy of the Assistant Manager of the OCS.

12. Plaintiff, Robert Brock, and some nine other people applied for the position.

13. A selection committee was convened in Washington, D.C., to select those best qualified for the position in AOCS and for a similar positon in the New York OCS office.

14. All 11 applicants were forwarded from the selection committee to Edward Hoffman, through Donald Truesdell, Deputy Assistant Director of BLM for Lands and Minerals, for interview and the ranking of finalists.

15. Edward Hoffman interviewed, either personally or telephonically, all of the 11 candidates for the position.

16. On December 12, 1977, Edward Hoffman sent a letter to his superiors in Washington, D.C. recommending Robert Brock, plaintiff, and Monte Jordan, in that order.

17. On December 19, 1977, Edward Hoffman was advised that his superiors in Washington, Donald Truesdell, Arnold Petty, and Guy Martin, had approved of Robert Brock, Hoffman's first choice, and Robert Brock was offered and accepted the position.

18. At the same time a woman was chosen as the Assistant Manager of the New York OCS office.

19. The entire selection process from the initial vacancy announcement, through the selection committee, through Edward Hoffmann's ranking of the candidates to the ultimate approval of Robert Brock was carried out in a superior manner with absolutely no hint of discrimination based upon sex.

20. Contemporaneous with plaintiff's rejection for the position, it was filled by Robert Brock's selection and no vacancy thereafter existed.

21. In making the final decision as to the ranking of the applicants Edward Hoffman, for his own purposes only, made a selection matrix upon which he based his decision, said matrix listed his comparative assessment of the qualifications of the top three candidates.

22. Plaintiff introduced another copy of P. Ex. 16A which was identical with P. Ex. 16A except that it was not dated and the back page contained two differences in which Hoffman added the terms "into the management function" at sentence 4 and deleted paragraph 7 dealing with Hoffman's retirement and the need for effective continuity.

23. Plaintiff took without permission P. ex. 16 along with other of Mr. Hoffmann's documents from a folder on his desk, reproduced them also without permission, and placed the originals back from where she took them so it would appear as if they had not been disturbed.

24. Hoffmann testifed that P. Exhibit 16A had not been altered after it was finalized on December 12, 1977, and not one scintilla of evidence has been introduced to contradict that assertion, accordingly the Court specifically finds that P. Ex. 16A has not been altered.

25. Plaintiff introduced certain statistical data, i.e., P. Ex. 9, which showed that in 1975 the Department of Interior employed women in only 2.8% of its GS-14 jobs, however, the OCS program nationwide has only four GS-14 jobs of which 25% are filled by women, accordingly, the statistical data submitted by plaintiff is singularly unhelpful for the plaintiff's case and is disregarded.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the instant case pursuant to 42 USC §200e-16 and 28 USC §1343.

2. That statistical evidence introduced at trial was singularly deficient and no prima facie case based upon

statistics has been established that would shift the burden of going forward to the defendant to articulate some legitimate nondiscriminatory reason for the employees rejection, *McDonnell Douglas Corp. v. Green*, 411 US 792 (1972); *Furnco Construction Corp. v. Waters*, ____ US ____, ____ S.Ct. ____, 57 L.Ed.2d. 957, 46 L.W. 4966 (1978); *Pack v. E.R.D.A.*, 566F.2d 1111 (9th Cir. 1977).

3. Plaintiff has not met the four point test of *McDonnell Douglas Corp., supra*, the fourth part of which requires "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complaintant's qualifications." Here, contemporaneous with plaintiff's rejection the job was filled and no vacancy remained open, and accordingly, plaintiff has not established a prima facie case based upon the *McDonnell Douglas* criteria. *McDonnell Douglas, supra; Furnco Construction Corp., supra; Pack v. E.R.D.A., supra.*

4. No competent, reliable or relevant evidence has been introduced by plaintiff which reasonably links her rejection for the sought-after position "in a way that plainly suggests" sexual discrimination, nor has any other evidence been introduced which reasonably links her rejection with sexual discrimination on the part of defendant. *Miller v. Williams*, 590 F.2d 312 (9th Cir. 1979).

5. Accordingly, plaintiff has not in any manner met her burden of establishing a prima facie case of sexual discrimination which shifts the burden to defendant to articulate some nondiscriminatory reason for the employee's rejection. Therefore, defendant's motion for involuntary dismissal must be granted and judgment on the merits entered for defendant. Defendant is entitled

to his costs. *McDonnell Douglas, supra; Furnco Construction, supra; Pack, supra; Miller, supra*; Rule 41(b), Fed. R. Civ. P.

DATED at Anchorage, Alaska, this 8th day of May, 1979.

/s/ James A. von der Heydt
JAMES A. VON DER HEYDT
United States District Judge

cc: United States Attorney
Charles Hagans

APPENDIX C

[FILED APRIL 9, 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAN A. HAGANS, Plaintiff-Appellant,

—vs—

CECIL ANDRUS, Secretary of the Department of the Interior, Defendant-Appellee.

No. 79-4424

D.C. No. A78-182 Civ

ORDER

Appeal from the United States District Court for the District of Alaska

Before: WALLACE, HUG and SCHROEDER, Circuit Judges.

The panel as constituted above has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 36(b).

The petition for rehearing en banc is rejected.